83-1007

FILED
DEC 19 1983
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1983

TIFFANY FINE ARTS, INC., *et al*

Petitioners,

–v–

UNITED STATES OF AMERICA, *et al*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 19, 1983

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners* respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, which sustained an order of the United States District Court for the Southern District of New York directing the enforcement of various Internal Revenue Service summonses served on petitioners.

QUESTIONS PRESENTED

(1) Whether an Internal Revenue Service general summons, issued under 26 U.S.C. §§ 7602 and 7604, which is served on a recordkeeper before an audit of the recordkeeper begins in substance and which seeks the identities of unnamed taxpayers, must comply with the provisions of 26 U.S.C. § 7609(f) regarding John Doe summonses, particularly when

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* Petitioners include Tiffany Fine Arts, Inc. and its wholly-owned subsidiaries, World Medical Marketing Corp. and World Video Corp.

the Service has enunciated an institutional purpose to audit such unnamed taxpayers.

(2) Whether a recordkeeper served with such a summons is entitled to an evidentiary hearing to determine if a John Doe summons subject to the provisions of 26 U.S.C. § 7609(f) is masquerading as a general summons.

PARTIES

The parties in this case are Petitioners-Appellants Tiffany Fine Arts, Inc., and its wholly-owned subsidiaries, World Video Corp. and World Medical Marketing Corp. and Respondents-Appellees the Internal Revenue Service by a Revenue Agent, Joel Lewis, and the United States of America.

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REPORTS OF OPINIONS

The opinion of the Second Circuit Court of Appeals in this case is reported at 718 F.2d 7 and is set forth in Appendix A.

The order of the United States District Court for the Southern District of New York was not accompanied by an opinion.

JURISDICTION

The decision sought to be reviewed herein was entered by the United States Court of Appeals for the Second Circuit on September 13, 1983. An order denying a rehearing was entered by the Court of Appeals on October 28, 1983. That order is set forth in Appendix B. An order granting a stay of the mandate of the Court of Appeals to permit petitioner to petition this Court for a writ of certiorari was entered on November 21, 1983. That order is set forth in Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutes are involved in this case:

26 U.S.C. (Internal Revenue Code of 1954, as amended) § 7602(a):

> AUTHORITY TO SUMMON, ETC. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—
>
> > (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

26 U.S.C. § 7604:

(a) JURISDICTION OF DISTRICT COURT—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) ENFORCEMENT—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6427(h)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the

case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

26 U.S.C. § 7609(c):

(1) IN GENERAL—Except as provided in paragraph (2), a summons is described in this subsection if it is issued under paragraph (2) of section 7602 or under section 6420(e)(2), 6421(f)(2), or 6427(b)(2) and requires the production of records.

(2) EXCEPTIONS—A summons shall not be treated as described in this subsection if—

(A) it is solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in subsection(a)(3)(A), or

(B) it is in aid of the collection of—

(i) the liability of any person against whom an assessment has been made or judgment rendered, or

(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

(3) RECORDS, CERTAIN RELATED TESTIMONY—For Purposes of This Section—

(A) the term "records" includes books, papers, or other data, and

(B) a summons requiring the giving of testimony relating to records shall be treated as a summons requiring the production of such records.

26 U.S.C. § 7609(f):

ADDITIONAL REQUIREMENT IN THE CASE OF A JOHN DOE SUMMONS—Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that—

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

STATEMENT OF THE CASE

Petitioners (hereinafter collectively, "Tiffany") sell products to investors on a tax-favored basis. During 1979 and 1980 Tiffany, through one of its subsidiaries, sold approximately 50 to 100 distributorships to various persons to promote the sale of one of Tiffany's products (a medical device called a "Pedi-Pulsor") in their licensed territories. Under the structure of the licensing program, licensees received tax benefits for the years 1979 and 1980.

From the start, the Internal Revenue Service's interest in Tiffany has been to determine the identities of its licensees on the theory that they were tax shelter investors. Sometime in the summer of 1981, Revenue Agent Joel Lewis ("Agent Lewis") visited the premises of Tiffany and requested the names, addresses and social security numbers of all Pedi-Pulsor licensees. Agent Lewis did not request the standard financial

information which is necessary to conduct any legitimate taxpayer audit. Agent Lewis was referred to Tiffany's attorney where he repeated his request for customer identities, which was denied.[1]

No further contact with Agent Lewis occurred until October 6, 1981, when Tiffany was served with four Internal Revenue Service ("IRS" or "Service") administrative summonses. Each summons requested all books, papers, records and other data pertaining to Tiffany's operations. Each summons also sought the names, addresses and taxpayer identification numbers of Tiffany customers who had purchased Pedi-Pulsor distributorships. Two summonses sought the identities of Tiffany customers who had purchased "lithographs" (Tiffany did not sell lithographs). These two summonses also sought the identities of Tiffany customers who had purchased any other asset from Tiffany. These summonses were served under 26 U.S.C. § 7602.

Tiffany declined to comply with the summonses on the ground that they was not served pursuant to a legitimate purpose. On November 9, 1982, the United States filed an action in the United States District Court for the Southern District of New York to enforce the summonses pursuant to 26 U.S.C. § 7604(a). The government's petition was accompanied by an affidavit of Agent Lewis which stated that he was "conducting an investigation, *one purpose of which* is to ascertain the correctness of" Tiffany's consolidated tax return. (Emphasis supplied.) Agent Lewis did not elaborate on the other purposes of the summonses, and Tiffany never had the opportunity to ask him.

Tiffany filed a memorandum of law, and appeared in Court on November 24, 1982, to show cause why the summonses should not be enforced. It filed an affidavit by Tiffany's chief operating officer, Dr. Stephen R. Hofstein, which stated

[1] Agent Lewis stated in an affidavit that he made an appointment with Tiffany's accountant in July of 1980, which was cancelled by the accountant, and that he visited Tiffany's attorney in August, 1981.

that, based on the events which had transpired, it appeared that the IRS was primarily interested in obtaining a list of Tiffany's customers, not in auditing Tiffany's tax return. Tiffany pointed out that it was the institutional posture of the IRS to obtain lists of investors from "tax shelter promoters" and forward them to the appropriate district offices, especially in the case of "lithograph programs". And although Tiffany did not sell lithographs, the IRS apparently did not realize that.

Tiffany objected to enforcement of each summons on the ground that it was essentially a "John Doe" summons which should have been served only after the IRS had complied with the requirements of 26 U.S.C. § 7609(f) (hereinafter "Section 7609(f)") governing the service of John Doe summonses. Tiffany argued that the IRS should not be permitted to avoid the requirements of Section 7609(f) by cloaking what was essentially a John Doe summons in the guise of a general summons which is served under 26 U.S.C. § 7602 and is not subject to any special requirements.

In its memorandum of law, and in oral argument, Tiffany requested the Court to limit the scope of each summons so that the identities of its customers would not have to be revealed. (Tiffany was willing to deliver the balance of its records to the IRS.) In the alternative, Tiffany requested the Court to conduct a hearing to determine whether the IRS was, in fact, serving what was essentially a John Doe summons subject to the requirements of Section 7609(f).

The District Court, from the bench, rejected Tiffany's request for a hearing and ordered the summonses enforced in full. Eventually it stayed its order pending appeal.

On appeal to the Court of Appeals for the Second Circuit, the Appeals Court affirmed the District Court. The Court, per Judge Pratt, described the "central issue" as follows: "whether an IRS summons issued under [26 U.S.C.] § 7602 in connection with the investigation of a named taxpayer, which might also facilitate the investigation of unnamed taxpayers, is

subject to the requirements of § 7609(f)."[2] The Second Circuit, recognizing a split in the circuits on the issue of so-called "dual purpose" summonses, held that the summons was legitimate as long as the recordkeeper was named in the summons as an audit target. The Court further held that the District Court had not abused its discretion in denying Tiffany a hearing to determine the true intent of the IRS since, in the Court's view, the dual purpose character of the summons did not require the Service to resort to the enforcement procedures provided in Section 7609(f).[3]

Following a request for a rehearing, which was denied, Tiffany petitioned this Court for a writ of certiorari to reconcile not only the conflict among the various Courts of Appeals on the interpretation of Section 7609(f) but also the conflict presented by that statute between taxpayers' privacy rights and the Service's rights to conduct its investigations.

The statutory basis for federal jurisdiction in the United States District Court is 28 U.S.C. § 1331.

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[2] Tiffany does not agree that this description is a proper statement of the "central issue". The "central issue" is whether the IRS may resort to a summons under 26 U.S.C. §§ 7602 and 7604, thereby evading the procedures of Section 7609(f), where its primary purpose—and, possibly, its predominant purpose—is to identify unnamed taxpayers, particularly where the IRS has enunciated a policy of auditing such taxpayers.

[3] Tiffany does not concede that the summons served on it was a "dual purpose" summons because, in its view, the summons may have been intended to serve only one purpose—learning the identities of Tiffany's clients. Tiffany would have attempted to demonstrate that had it been granted an evidentiary hearing.

ARGUMENT

In general.

This case is ripe for Supreme Court review to resolve a sharp and growing split in the Circuit Courts of Appeals on the interpretation of an important Federal statute relating to the circumvention by the Internal Revenue Service of the administrative procedures intended to govern the use of John Doe summonses. The statutory framework in question has a substantial impact on the power of the IRS to gather information and on the rights of citizens to be protected from unwarranted government intrusion on their privacy. It also creates an opportunity for potentially serious abuse of the courts' process in enforcing IRS summonses. The Circuit Courts of Appeals are interpreting the same statute, and the same legislative history, in a directly conflicting manner. This Court has yet to rule on the issues presented by this case, and its guidance is required to resolve an admittedly difficult question on the interpretation of a statute which has a direct and meaningful impact on a significant segment of the public.

Statutory framework.

The Internal Revenue Code of 1954 (26 U.S.C., hereinafter "Code") Section 7602 authorizes the IRS to examine the books and records of any person in connection with an investigation of the tax liability of any other person. However, Code Section 7609 imposes certain limitations on the use of this authority. Under Section 7609(f), an IRS summons "which does not identify the person with respect to whose liability the summons is issued" may be served only after the IRS has demonstrated to a court that it has met the requirements of Section 7609(f).[4]

[4] These requirements are: (1) that the summons relates to the investigation of a particular person or ascertainable group of persons; (2) that there is a reasonable basis to believe that such persons may have improperly avoided tax; and (3) that the information sought by the IRS cannot readily be obtained elsewhere. The IRS establishes that it has met these requirements in an ex parte proceeding in a Federal District Court under Code Section 7609(h).

The split in the circuits.

The Circuit Courts of Appeals disagree on the applicability of Section 7609(f) to a summons which primarily seeks the identities of unnamed taxpayers but which does name as an audit target the party served with the summons. The Courts of Appeals disagree on when a summons "does not identify the person with respect to whose liability the summons is issued" so that it becomes subject to Section 7609(f). The Sixth Circuit has ruled that, if a summons seeks information about a taxpayer who is not identified in the summons, it is subject to Section 7609(f). The Eighth and Eleventh Circuits, and the Second Circuit in this case, have held that Section 7609(f) does not apply, regardless of how many unidentified taxpayers are targets of the summons, as long as the recordkeeper itself is under audit.

In *United States v. Thompson,* 701 F.2d 1175 (6th Cir. 1983), the IRS, as part of its program to investigate the activities of organized barter exchanges, initiated an audit of Barter Exchange of Nashville, a partnership. During the audit, the IRS served a general summons under Code Section 7602, requesting documents of the partnership which identified the partnership's clients — those people for whom the partnership served as a clearinghouse for the bartering of goods and services. The partnership declined to provide this information on the ground that the summons did not identify the persons with respect to whose tax liability it was issued and that, accordingly, the IRS had to first meet the requirements of Section 7609(f).

The IRS argued that its "primary purpose" in seeking the contested information was to audit the partnership. It conceded that the names of the members of the exchange which it obtained would be used to determine whether, and how many, audits of the exchange members would be conducted, but it maintained that such use of the names was a "secondary purpose".

The Sixth Circuit noted that, based on the testimony of the IRS agent involved, it was undisputed that one purpose of the summons was to identify and audit the members of the exchange. The Sixth Circuit further noted that it was the institutional posture of the IRS to identify and audit barter exchange members. Under these circumstances, the Court ruled, the literal language of the Code triggered the operation of Section 7609(f), whatever the IRS's primary purpose may have been. The summons had identified the partnership, but not its clients, and since it was issued at least in part with respect to their tax liabilities, it was covered by Section 7609(f). Since the IRS had not complied with Section 7609(f), enforcement of the summons was denied.

The Sixth Circuit's decision in *Thompson* was directly contrary to a previous decision by the Eighth Circuit Court of Appeals in *United States v. Barter Systems, Inc.*, 694 F.2d 163 (8th Cir. 1982). *Barter Systems* also involved an IRS audit of a barter exchange and a general summons, issued under Code Section 7602, seeking the identities of its members. The Eighth Circuit reasoned that the summons was not a "John Doe" summons because it identified the barter exchange.

In the proceeding before this Court, the Second Circuit Court of Appeals followed the mechanistic logic of the Eighth Circuit. It ruled that the summons served on Tiffany was not a John Doe summons because it identified Tiffany, even though a primary purpose of the summons may have been to identify unnamed taxpayers and even though the Service, as an institution, has targeted lithograph investors for identification and audit (see Internal Revenue Manual IRM 42 (17), Exhibit 42(17)0-1). Therefore, Section 7609(f) did not apply.[5]

The Sixth Circuit, in *Thompson*, noted that the legislative history of Section 7609(f) was totally consistent with the

[5] It should be noted that the audits in *Thompson* and *Barter Systems* had proceeded considerably further than the audit in this case, and that the summonses in those cases were more appropriately labled as "dual purpose" summonses.

statutory language and "compelled" the application given to that language by the Sixth Circuit. 701 F.2d at 1180. The Eighth Circuit, in *Barter Systems*, stated that nothing in the legislative history suggested that Congress intended that Section 7609(f) apply to dual purpose summonses. 694 F.2d at 168.

In another dual purpose summons case, *United States v. Gottlieb*, 712 F.2d 1363 (11th Cir., 1983), the Eleventh Circuit also sided with the Eighth Circuit. In the Eleventh Circuit's view, the Congress was "silent" on the issue of whether Section 7609(f) applied in the case of a dual purpose summons. It based its decision principally on the "deferential standard which must be applied when construing congressional intent regarding the scope of the IRS's summons authority." 712 F.2d at 1369.

In *Barter Systems* and *Gottlieb*, the Courts of Appeals reversed lower court decisions that held that Section 7609(f) applied. Thompson was a reversal of a lower court decision that held that Section 7609(f) did not apply.

It is clear that the circuits are split on the issue of when a summons identifies the person with respect to whose tax liability it was issued, that the Service's information-gathering power is consequently greater in the Second, Eighth and Eleventh Circuits than in the Sixth Circuit, and that the privacy rights of citizens in the former circuits are consequently accorded less protection than in the latter circuits. Given the importance of the statute which is being interpreted in a directly conflicting manner, it is submitted that certiorari should be granted on this ground alone.

The abuse of the courts' process.

One aspect of the dual purpose summons problem which has not been addressed by any of the circuit courts involves the potential abuse of the courts' process in the enforcement of such summonses. The legislative history of Section 7609(f) makes one point indisputably clear: Congress enacted Section 7609(f) to curb the potential abuse of the John Doe summons process

after this Court's decision in *United States v. Bisceglia*, 420 U.S. 141, 95 S.Ct. 915 (1975). In *Bisceglia*, this Court upheld the use of the John Doe summons as long as the IRS was not engaged in a fishing expedition. Congress enacted Section 7609(f) so that a court would supervise the Service's use of John Doe summonses. See *General Explanation of the Tax Reform Act of 1976*, Prepared by the Staff of the Joint Committee on Taxation, December 29, 1976, at 364-69 (reproduced in 1976-3 (Vol. 2) Cum. Bull. 376-82).

As a practical matter, any time that the IRS wants to obtain client lists, under *Barter Systems*, *Gottlieb* and the Second Circuit's decision in this case, it can avoid the requirements of Section 7609(f) merely by initiating an audit of a recordkeeper such as Tiffany, however specious or superficial the audit may be. When it then serves a general summons requesting client lists and asks the court to enforce that summons, it enlists the aid of the court's process. If the only true reason for initiating the audit was to avoid the Section 7609(f) requirements, the IRS abuses the court's process when it asks it to enforce a summons which is designed to circumvent the Section 7609(f) rules. Surely the courts have the power to inquire into the exact nature of the IRS's purpose. *Thompson* did not address this issue directly, but its holding, which looks to the purpose of the summons, permits the court to prevent its process from being abused in this manner.

The case before the Court invites the Service to circumvent the procedures of Section 7609(f) by simply identifying the recordkeeper as an audit target. Tiffany alleges, without contradiction, that Agent Lewis initially asked for Tiffany's client list without even advising Tiffany that it was under audit. Even if Agent Lewis had advised Tiffany that it was under audit, he requested Tiffany's client list at the very beginning of an audit—before he had requested or looked at any of Tiffany's books and records. In fact, at that time Agent Lewis knew so little about the company that he incorrectly thought that it sold lithographs. One has to wonder how Agent Lewis knew he would need Tiffany's client list in order to audit Tiffany before

he knew anything else about Tiffany except that it licensed Pedi-Pulsors.

Was Agent Lewis skirting the Section 7609(f) requirements? The possibility exists—and at least a hearing on that issue would have assisted the court in assuring that its process was not being abused. The Second Circuit ruled that a hearing was not required because, as long as Tiffany was under audit, the other purposes of the IRS, no matter how significant in motivating the Service, were immaterial. But Tiffany could have been placed "under audit" at any time, and the Second Circuit's position fails to provide the protection needed to prevent abuse of the court's process in the enforcement of an IRS summons. The potential for abuse of a Federal Court's process by itself merits this Court's review.

Threats to rights of privacy.

The decision below creates a substantial threat to taxpayers' rights of privacy which Congress specifically sought to protect. It was privacy rights that Congress was concerned about when it enacted Section 7609(f). In explaining the provision, the Staff of the Joint Committee on Taxation wrote:

> Reasons for change
>
> The use of the administrative summons, including the third-party summons, is a necessary tool for the IRS in conducting many legitimate investigations concerning the proper determination of tax. The administration of the tax laws requires that the Service be entitled to obtain records, etc., without an advance showing of probable cause or other standards which usually are involved in the issuance of a search warrant. On the other hand, the use of this important investigative tool should not unreasonably infringe on the civil rights of taxpayers, including the *right to privacy*.

Even prior to the enactment of this provision, the Service has instituted an administrative policy designed to

establish certain safeguards in this area. Under this policy, IRS representatives were instructed to obtain information from taxpayers and third parties on a voluntary basis where possible. Where a third-party summons is served, advance supervisory approval was required. In the case of a John Doe summons, the advance supervisory approval was required to be obtained on a high level basis. The Congress decided, however, that these administrative changes, while commendable, do not fully provide all of the safeguards which might be desirable in terms of protecting the *right of privacy.*

General Explanation of the Tax Reform Act of 1976, supra, at 364-65 (reproduced at 1976-3 Cum. Bull. (Vol. 2) at 376-77). [Emphases supplied.]

By circumventing the procedures of Section 7609(f), the dual purpose summons clearly infringes on privacy rights which Congress intended to protect when it enacted Section 7609(f). The issues are whether (1) Congress intended to protect these rights even in the case of a dual purpose summons and whether (2) at the least Congress expected the courts to monitor dual purpose summonses to assure that the provisions designed to guard those rights were not being circumvented improperly.

The cases cited in this petition suggest that the IRS is using dual purpose summonses with considerable frequency, and that the rights of a substantial number of people are involved. It is not often that Congress imposes limitations on the IRS's information-gathering authority. The fact that it did so in Section 7609(f) indicates that Congress considered the privacy rights at stake to be of the utmost importance. The possibility that the integrity of those rights is being compromised by the dual purpose summons also warrants this Court's review of the use of such summonses.

CONCLUSION

For the foregoing reasons, this petition should be granted and a writ of certiorari should be issued to review the decision below.

Respectfully submitted,

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Appendix A

UNITED STATES and Joel Lewis, Revenue Agent, Internal Revenue Service, Petitioners-Appellees,

v.

TIFFANY FINE ARTS, INC. and its subsidiaries, including World Medical Marketing Corporation and World Video Corp., Respondents-Appellants.

No. 1006, Docket 82-6336.

United States Court of Appeals,
Second Circuit.

Argued March 28, 1983.
Decided Sept. 13, 1983.

Before KEARSE, PIERCE and PRATT, Circuit Judges.

GEORGE C. PRATT, Circuit Judge:

Tiffany Fine Arts, Inc. and two subsidiaries, World Medical Marketing Corp. and World Video Corp. (collectively referred to as Tiffany) appeal from an order of the District Court for the Southern District of New York (Vincent L. Broderick, *Judge*), enforcing four Internal Revenue Service administrative summonses. Tiffany's principal contention on appeal is that before issuing the summonses the IRS was required to comply with the "John Doe" provisions of 26 U.S.C. § 7609(f)(1976). In addition, Tiffany argues that Judge Broderick abused his discretion by refusing to hold a hearing regarding the purpose underlying the summonses.

We affirm.

BACKGROUND

Tiffany Fine Arts, Inc. is a holding company for various subsidiaries engaged in promoting tax shelters. Sometime before August 28, 1981, IRS revenue agent, Joel Lewis asked Tiffany for a list of names, addresses, and social security numbers of the licensees of a product known as the "Pedi-Pulsor", which World Medical was marketing. When Tiffany refused, Lewis issued four summonses on October 6, 1981.

Each summons identified "Tiffany Fine Arts, Inc. and Subsidiaries" as the subjects of an IRS investigation. Two were addressed to Tiffany Fine Arts, Inc. in care of Steven Hofstein, President, and Janine Martinelli, Secretary and Treasurer, and directed them to appear before Lewis to give testimony and to produce the following documents:

> (1) All books, papers, records and other data pertaining to the operation of Tiffany Fine Arts Inc. and subsidiaries (including World Medical Marketing Corp.) for the periods ending October 31, 1979 and October 31, 1980, including but not limited to the following specific records: general ledger, sales journal, purchase book, cash receipts book, cash disbursement book, cancelled checks and bank statements, workpapers, sales contracts, and purchase invoices for the above described periods.
>
> (2) A list of the names, addresses, social security and employer identification numbers for all individuals, partnerships, estates, trusts and corporations who acquired: Pedi-Pulsor distributorships from World Medical Marketing Corporation Inc., World Medical Marketing Corporation, World Video Corporation or any other subsidiary corporation of Tiffany Fine Arts Inc.
>
> (3) A list of the names, addresses, social security and employer identification numbers for all individuals, partnerships, estates, trusts and corporations who acquired lithographs from Tiffany Fine Arts Inc.
>
> (4) A list of the names, addresses, social security and employer identification numbers for all individuals, partnerships, estates, trusts and corporations who acquired any asset, distributorship, etc. from Tiffany Fine Arts Inc., World Medical Marketing Corporation, World Video Corporation or any other subsidiary corporation of Tiffany Fine Arts Inc.

The remaining two summonses were addressed to World Medical Marketing Corp., in care of Peter Rosenthal, President, and Janine Martinelli, Secretary and Treasurer, and directed them to give testimony and to produce the following documents:

> (1) All books, papers, and other data pertaining to the operation of World Medical Marketing Corporation (a subsidiary of Tiffany Fine Arts Inc.), for the periods ending October 31, 1979 and October 31, 1980, including but not limited to the following specific records: general ledger, sales journal, purchase book, cash receipts book, cash disbursement book, cancelled checks and bank statements, workpapers, sales contracts and purchase invoices for the above described periods.
>
> (2) A list of the names, addresses, social security and employer identification numbers for all individuals, partnerships, estates, trusts and corporations who acquired Pedi-Pulsor distributorships from World Medical Marketing Corporation. Also copies of the application for license fact sheets signed by each licensee.

When Tiffany refused to comply with the summonses, the IRS initiated this enforcement proceeding under 26 U.S.C. §§ 7402(b) and 7604 with an order to show cause and petition, supported by an affidavit of agent Lewis which briefly explained:

> * * * I am conducting an investigation, one purpose of which is to ascertain the correctness of the consolidated corporate income tax returns filed by [Tiffany] for the fiscal years ending October 31, 1979, and October 31, 1980. One aspect of my investigation into the correctness

> of Tiffany's consolidated corporate income tax returns concerns possible underreporting of income received and questionable business deductions claimed by [Tiffany].

In opposition, Tiffany's president, Steven R. Hofstein, asserted, among other things, that the "true motive" of the IRS was "to ascertain and audit the tax returns of [Tiffany's] clients, not [Tiffany]". He emphasized that the IRS was unwilling to accept redacted records or to limit its examination to a random check of Tiffany's clients. He also noted that the summonses requested information concerning purchasers of lithographs, whom the IRS had singled out for special audit. Since Tiffany had never engaged in the sale of lithographs, Hofstein argued that this confirmed that the IRS was "on a blatant fishing expedition which cannot be condoned pursuant to I.R.C. § 7602." In an accompanying memorandum of law, Tiffany argued that the IRS could obtain the third party information it desired only by satisfying the requirements for a "John Doe" summons set forth in § 7609(f).

By a supplemental affidavit agent Lewis elaborated on the reasons underlying his investigation of Tiffany. He suspected that Tiffany "may have underreported its gross receipts because certain recourse and non-recourse notes provided by the licensees of a product distributed by World Medical did not appear to be included in World Medical's income." To verify the accuracy of Tiffany's returns, he "would have to examine the original books of entry and the underlying licensing agreements to match the income reflected by those agreements to the income reported by World Medical." Thus, asserted Lewis, Tiffany's offer to produce only certain redacted records was unacceptable.

As to the lithograph issue, Lewis explained that "I had information from another source that a company called 'Tiffany,' which did business in Florida, was in the business of selling lithographs." When he initially inquired whether the two companies, were one and the same, Tiffany's attorney "would neither confirm nor deny that the Tiffany herein sold litho-

graphs." Thus, he requested records relating to lithographs "out of an abundance of caution".

With respect to Tiffany's charges concerning the motivation of the IRS, however, Lewis conceded that by examining the licensing agreements, I would also be able to identify individuals who have participated in what appears to be an abusive tax shelter. It is certainly possible that once the individuals are identified further inquiry will be made into whether they have correctly reported their income tax liabilities.

After oral argument, Judge Broderick held that the IRS had made a sufficient showing that its "interest is in an audit of the consolidated returns of Tiffany." He therefore ruled that the IRS was authorized to issue the four summonses under 26 U.S.C. § 7602, without additionally having to satisfy the requirements of § 7609(f). He also ruled that no evidentiary hearing was necessary since Tiffany's "hypothesis" that the IRS's real motivation was solely to audit Tiffany's clients was rebutted by a "clear factual statement" that the IRS was legitimately interested in Tiffany's own tax liabilities.

On appeal, the parties repeat essentially the same arguments they advanced below. Based on the broad sweep of the four summonses, which followed the IRS's initial request for third party information, Tiffany argues that the summonses were, at best, issued for the dual purpose of investigating both it and its clients and, at worst, purely pretextual. In either event, it contends, the IRS was required to comply with § 7609(f) since a "substantial objective" of the summonses was the identification of unnamed taxpayers. At the very least, Tiffany claims, the district judge should have ordered a hearing to determine whether the IRS was proceeding in good faith.

The IRS, on the other hand, maintains that it is conducting an ongoing, particularized investigation of Tiffany. While it does not concede that the summonses were issued for a dual purpose, it argues that its legitimate concerns with Tiffany make compliance with § 7609(f) unnecessary, regardless of whether it may also be concerned with Tiffany's customers. Finally, the IRS contends that no hearing was required in the district court.

DISCUSSION

To place these competing claims about the IRS's administrative summonses in context, we begin by briefly surveying the backdrop of statutory and case law against which § 7609(f) was enacted in 1976. Section 7601 of the 1954 Code generally authorizes the IRS to "inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed." Section 7602 empowers the IRS "[t]o examine any books, papers, records, or other data which may be relevant or material" to an inquiry into "the correctness of any return". Section 7604(b) permits the IRS to petition the district court to enforce its administrative summonses.

[1, 2] The general criteria for judicial enforcement of any IRS summons were established by the Supreme Court in *Reisman v. Caplin*, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964), and *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). As this court recently summarized in *In re Tax Liabilities of John Does*, 688 F.2d 144, 147—48 (2d Cir.1982):

> In general, to obtain judicial enforcement of a summons, the Government is required * * * to make a prima facie showing that: (1) its investigation was being conducted for a legitimate purpose; (2) its inquiry may be relevant to that purpose; (3) the information sought is not already within the Government's possession; and (4) the administrative steps required by the Internal Revenue Code have been followed. Once that showing is made, the burden shifts to the summoned party who may challenge summons enforcement on any "'appropriate * * * ground,'" * * * or otherwise prove that enforcement would constitute an abuse of the court's process.

(citations and footnotes omitted).

Within this statutory framework, the Supreme Court ruled in *United States v. Bisceglia*, 420 U.S. 141, 95 S.Ct. 915, 43 L.Ed2d 88 (1975), that the IRS was authorized under the broad language of §§ 7601 and 7602 to issue a so-called "John Doe" summons, one that seeks books and records of a transaction without naming the taxpayer involved. *Bisceglia* involved an administrative summons which the IRS issued to a bank to discover the identity of a customer who had deposited 400 deteriorated $100 bills. Given the suspicious nature of the transaction, a majority of the Court had little difficulty approving this use of the summons power. While the *Bisceglia* majority apparently recognized that its expansive interpretation of §§ 7601 and 7602 created a risk that the IRS might attempt "to conduct 'fishing expeditions' into the private affairs" of unnamed taxpayers, 420 U.S. at 150, 95 S.Ct. at 921, it reasoned that by creating the enforcement proceeding mechanism Congress had intended to place the federal courts between the IRS and the person summoned, and that the courts could contain this threat by narrowing the scope of or refusing to enforce abusive summonses. *Id.* at 146, 95 S.Ct. at 919.

Troubled by the implications of *Bisceglia*, Congress enacted § 7609(f) as part of the Tax Reform Act of 1976, Pub.L. No. 94—455, § 1205(a), 90 Stat. 1520, 1701—02, to prevent indiscriminate use of the John Doe summons. In doing so Congress attempted to strike a balance between the legitimate needs of the IRS and the privacy interests of unidentified third parties. For example, the house committee which drafted the provision observed that "[t]he use of the administrative summons * * * is a necessary tool for the IRS in conducting many legitimate investigations * * * [but] should not unreasonably infringe upon the civil rights of taxpayers, including the right to privacy." H.R.Rep. No. 94—658, 94th Cong., 2d Sess. 307, *reprinted in* [1976] U.S.Code Cong. & Ad. News 2897, 3202. The same report later noted that "[w]hile * * * it is important to preserve the John Doe summons as an investigative tool which may be used in appropriate circumstances * * * the committee does not intend that the John Doe

summons is to be available for purposes of enabling the Service to engage in a possible 'fishing expedition.' " *Id.* at 3207.

To accommodate these conflicting interests, the committee report anticipated "that when the Service does seek court authorization to serve [a] John Doe summons, it will have specific facts concerning a specific situation to present to the court." *Id.* At the same time, however, the committee expressly did "not intend to impose an undue burden on the Service in connection with obtaining a court authorization to serve this type of summons. * * * It is enough for the Service to reveal to the court evidence that a transaction has occurred, and that the transaction * * * is of such a nature as to be reasonably suggestive of the possibility that the correct tax liability with respect to that transaction may not have been reported * * *." *Id.*

This balance is reflected in the statutory scheme Congress established. Section 7609(f) sets out the modest standards the IRS must satisfy to serve a John Doe summons, defined as one "which does not identify the person with respect to whose liability the summons is issued", and it requires advance approval by the court. Section 7609(h) permits the district court to approve the John Doe summons in an *ex parte* proceeding which "shall be * * * [determined] solely on the petition and supporting affidavits."

With this background in mind, we turn to the central issue on this appeal: whether an IRS summons issued under § 7602 in connection with the investigation of a named taxpayer, which might also facilitate the investigation of unnamed taxpayers, is subject to the requirements of § 7609(f). While this court has not previously addressed this issue, the Sixth, Eighth and Eleventh Circuits recently have. *United States v. Thompson,* 701 F.2d 1175 (6th Cir. 1983); *United States v. Barter Systems, Inc.,* 694 F.2d 163 (8th Cir. 1982); *United States v. Gottlieb,* 712 F.2d 1363 (11th Cir. 1983).

In *Barter Systems,* the IRS issued a summons to an organized barter exchange under § 7602, requesting, among

other things, the names and account numbers of the exchange's members, as well as information concerning transactions in which those members had engaged. The Eighth Circuit held:

> [T]he John Doe summons procedures of 26 U.S.C. § 7609(f)(1976) do not apply to the issuance of a summons which has the purpose of determining a known taxpayer's liabilities and produces the fallout or further effect of discovering information that would aid in identifying unnamed taxpayers and investigating their tax liabilities.

694 F.2d at 169. Relying on *United States v. Euge,* 444 U.S. 707, 711, 100 S.Ct. 874, 878, 63 L.Ed.2d 141 (1980), for the proposition that the IRS's summons authority "should be upheld [under § 7602] absent express statutory prohibition or substantial countervailing policies", the court in *Barter Systems* emphasized that § 7609(f), by its express terms, only applies "in the case of a John Doe summons" which "does not identify the person with respect to whose liability the summons is issued." 694 F.2d at 167-68. The court therefore determined that the summons in question "was not a John Doe summons" since it identified the exchange as a target of an IRS investigation. *Id.* at 168. Looking to the legislative history of § 7609(f), the court found no indication that Congress intended the John Doe procedures to apply to any summons that identified a particular taxpayer even though it might also aid in the investigation of unnamed third parties, *Id.* at 168—69. *Accord United States v. Constantinides,* 1981—1 U.S.T.C. (CCH) ¶ 9317 (D.Md.1980).

The Eleventh Circuit reached essentially the same conclusion in *United States v. Gottlieb,* which also involved a barter exchange. Emphasizing "that a deferential standard must be applied when construing congressional intent regarding the scope of the IRS's summons authority", the court

> agree[d] with the Eighth Circuit that the claimed authority is necessary for the effective enforcement of the tax laws, that there clearly is no express statutory prohibition against

the enforcement of the summons in question, and that neither the statute nor the legislative history identifies any substantial countervailing purposes which require us to deny enforcement of the summons.

At 1369.

The Sixth Circuit, however, reached the opposite conclusion in *United States v. Thompson*, another barter exchange case. As in both *Barter Systems* and *Gottlieb*, the facts in *Thompson* suggested that the IRS had a dual purpose in mind when it issued the summons in question. Because the summons did not identify *each* "person with respect to whose liability the summons is issued", however, the court concluded that "in a most literal sense the language of § 7609(f) is triggered here." 701 F.2d at 1180.

[3] We think the position taken by the Eighth and Eleventh Circuits represents the better view. A formidable line of Supreme Court cases establish that the summons power of the IRS should be construed broadly. *United States v. Euge*, 444 U.S. at 714—18, 100 S.Ct. at 879—81; *United States v. Bisceglia*, 420 U.S. at 150, 95 S.Ct. at 921; *Donaldson v. United States*, 400 U.S. 517, 535, 91 S.Ct. 534, 544, 27 L.Ed.2d 580 (1971); *United States v. Powell*, 379 U.S. at 53—54, 85 S.Ct. at 252—53; *United States v. Chamberlain*, 219 U.S. 250, 269, 31 S.Ct. 155, 162, 55 L.Ed. 204 (1911). *See also United States v. Arthur Young & Co.*, 677 F.2d 211, 218 (2d Cir.1982), *cert. granted*, — U.S. —, 103 S.Ct. 1180, 75 L.Ed.2d 429 (1983). In the absence of any explicit indication in the language or legislative history of § 7609(f) that the John Doe procedures should apply to a dual purpose summons, we therefore cannot accept the narrow, literal construction adopted by the Sixth Circuit and urged by Tiffany here. As far as we can determine, the drafters of § 7609(f) addressed only a situation, like *Bisceglia*, in which the IRS issued a summons to an identifiable party in whom it had no interest in order to investigate the potential tax liabilities of unnamed third parties. We agree

with the Eighth and Eleventh Circuits that § 7609(f) should be limited to that context.

There is further, albeit indirect, support for this conclusion in the legislative history. As the house report indicates, Congress sought to balance its concern with protecting the privacy interests of unnamed taxpayers against its concern with not imposing undue burdens on the IRS. Adopting Tiffany's position could easily destroy the delicate balance struck by § 7609(f), because virtually any IRS summons is likely to uncover some information that could be used to identify or investigate third party taxpayers, and if every recipient of a summons issued under § 7602 could demand that the IRS satisfy the requirements of § 7609(f), the IRS would be shouldered with significantly greater administrative burdens than Congress intended.

[4] As noted by the Eleventh Circuit in *Gottlieb*, at 1369, Tiffany's position is also inconsistent with two lines of analogous cases involving dual purpose summonses. The Supreme Court's decisions in *United States v. LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978), and *Donaldson v. United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971), establish that even if the primary purpose of the issuing agent is to investigate criminal conduct, a summons issued under § 7602 is enforceable, provided that the IRS has not abandoned in an institutional sense the pursuit of civil tax determination or collection. *See also United States v. Morgan Guaranty Trust Co.*, 572 F.2d 36 (2d Cir.), *cert. denied*, 439 U.S. 822, 99 S.Ct. 89, 58 L.Ed.2d 114 (1978). Similarly, numerous courts have held that an IRS summons issued primarily to obtain research data is enforceable as long as it is also supported by a civil tax determination purpose. *E.g., United States v. First National Bank in Dallas*, 635 F.2d 391, 395—96 (5th Cir.), *cert. denied*, 452 U.S. 916, 101 S.Ct. 3051, 69 L.Ed.2d 420 (1981); *United States v. Pittsburgh Trade Exchange Inc.*, 644 F.2d 302, 307—08 (3rd Cir.1981); *United States v. Flagg*, 634 F.2d 1087, 1091—92 (8th Cir. 1980), *cert. denied*, 451 U.S. 909, 101 S.Ct. 1977, 68 L.Ed.2d 297 (1981)

United States v. Island Trade Exchange, Inc., 535 F.Supp. 993, 997 (E.D.N.Y.1982). Thus, even assuming that the summonses in this case were issued to Tiffany partly for the purpose of investigating Tiffany's customers, the existence of that purpose—regardless of how it is characterized—does not invalidate the summonses because the IRS is pursuing the civil tax liability of a named taxpayer, Tiffany.

[5, 6] The only remaining issue is whether Judge Broderick abused his discretion in declining to hold a hearing to determine whether the IRS was legitimately concerned with Tiffany when it issued the four summonses. We hold that no hearing was necessary. Unless a taxpayer opposing enforcement of a summons makes a "substantial preliminary showing" of an alleged abuse, neither an evidentiary hearing nor limited discovery need be ordered by the district court. *United States v. Morgan Guaranty Trust Co.*, 572 F.2d at 42—43 n. 9; *see United States v. Noall*, 587 F.2d 123, 127 (2d. Cir.1978), *cert. denied*, 441 U.S. 923, 99 S.Ct. 2031, 60 L.Ed.2d 396 (1979). The Hofstein affidavit did raise some question as to whether the IRS was "primarily" interested in Tiffany or in its customers. But we have concluded that the only relevant question is whether, the IRS was legitimately conducting an ongoing investigation of Tiffany's tax liability, and the allegations in the Hofstein affidavit do not amount to the type of "substantial preliminary showing" that would require further inquiry on that issue. Since the affidavits by agent Lewis established an ongoing IRS investigation of Tiffany sufficient to support the summonses issued here without compliance with the John Doe provisions of § 7609(f), Judge Broderick was well within his discretion in declining to order an evidentiary hearing.

Affirmed.

Appendix B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-eighth day of October , one thousand nine hundred and eighty-three.

UNITED STATES and JOEL LEWIS, Revenue Agent, Internal Revenue Services,

Plaintiff-Appellees,

v. No. 82-6336

TIFFANY FINE ARTS, Inc., et al.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants, Tiffany Fine Arts, Inc., et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

Francis X. Gindhart

by Francis X. Gindhart,
Chief Deputy Clerk

Exhibit A

Appendix C

United States Court of Appeals
FOR THE SECOND CIRCUIT

82-6336 79

UNITED STATES and JOEL LEWIS, Revenue Agent, Internal Revenue Sevices,

Plaintiff-Appellees,

v.

TIFFANY FINE ARTS, et al.,

Defendants-Appellants.

Use short title

82-6336
Docket Number

NOTICE OF MOTION

state type of motion

for stay of mandate pursuant to Fed. R. App. P. Rule 41(b)

MOTION BY: *(Name and tel. no. of law firm and of attorney in charge of case)*

Michael D. Savage, Esq.
Gersten, Savage & Kaplowitz
150 East 58th Street
New York, N.Y. 10155 - 752-9700

OPPOSING COUNSEL: *(Name and tel. no. of law firm and of attorney in charge of case)*

Frederick M. Lawrence, Esq.
Office of U. S. Attorney
St. Andrews Plaza
New York, N.Y.
791-7096

UNITED STATES COURT OF APPEALS
NOV - 4 1983
SECOND CIRCUIT

Has consent of opposing counsel:
A. been sought? ☐ Yes ☒ No
B. been obtained? ☐ Yes ☒ No
Has service been effected? ☒ Yes ☐ No
Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)
Requested return date:
(See Second Circuit Rule 27(b))
Has argument date of appeal been set:
A. by scheduling order? n/a ☐ Yes ☐ No
B. by firm date of argument notice? ☐ Yes ☐ No
C. If Yes, enter date:
Judge or agency whose order is being appealed:

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8) n/a
Would expedited appeal eliminate need for this motion? n/a ☐ Yes ☐ No
If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☒ No

Brief statement of the relief requested:
Respondents-Appellants requested a stay of mandate to the District Court pending application to the Supreme Court of the United States for a writ of certiorari.

Complete Page 2 of This Form

By: *(Signature of attorney)*

Appearing for: *(Name of party)*
TIFFANY FINE ARTS, INC. and its subsidiaries, including WORLD MEDICAL MARKETING CORPORATION and WORLD VIDEO CORP.

Appellant or Petitioner: ☐ Plaintiff ☐ Defendant (Respondent)
Appellee or Respondent: ☒ Plaintiff ☐ Defendant (Petitioner)

Signed name must be printed beneath
Richard B. Lind
Gersten, Savage & Kaplowitz

Date
November 3, 1983

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion

UNITED STATES COURT OF APPEALS
FILED
NOV 21 1983
SECOND CIRCUIT

be and it hereby is granted

Dated 11-21-83

Circuit Judges